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I. GROUNDS FOR EMPLOER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON OBJECTION

Pursuant to Sections 102.67 and 102.69 of the Rules and Regulations of the National Labor Retaliations Board ("NLRB" or "Board"), Employer, Olney Charter High School, an ASPIRA of PA School ("Olney Charter" or "Employer"), respectfully submits this Brief in Support of its Exceptions to the Hearing Officer's Report dated July 8, 2015 ("Decision").¹

In that Decision, Hearing Officer William Slack ("Hearing Officer") concluded that Employer was not a political subdivision exempt from the Board's jurisdiction under Section 2(2) of the National Labor Relations Act ("NLRA" or the "Act"). Despite the fact that Olney Charter is a statutorily created public school, the Hearing Officer concluded that Olney Charter is not a "political subdivision" of the Commonwealth of Pennsylvania within the meaning of Section 2(2) of the NLRA. The Decision further concluded that Olney Charter: (1) was not created directly by the state so as to constitute a department or administrative arm of the government even though Olney Charter could not exist absent the Charter School Law and the Renaissance Initiative and would cease to exist without the charter agreement issued by the School District of Philadelphia (the "District"); and (2) was not administered by individuals responsible to government officials despite the Pennsylvania Public School Code ("the Code") expressly defining Olney Charter's Board of Trustees ("BOT") as public officials and Olney Charter's accountability to the District under both the Charter School Law, the Renaissance Initiative Policy and the very terms of Olney Charter's charter agreement. Moreover, the Hearing

¹ References to the Hearing Officer's Decision are herein designated as (Dec. ____), references to the Board's Exhibits are designated herein as (Bd. ____), references to the Employer's Exhibits are designated herein as (Ex. ____), references to the Union's Exhibits are designated herein as (Px. ____), and references to the transcript are designated herein as (Tr. ____).

Officer declined to consider that a union at Olney Charter would be severely restricted in negotiating certain terms and conditions of employment and would have a limited ability to strike, and thus severely limited economic leverage.

Olney Charter respectfully seeks review of the Decision for the following reasons:

1. The Hearing Officer's Decision that Olney Charter is not an exempt political subdivision raises a substantial question of law and policy due to a clear departure from the Board's (and the U.S. Supreme Court's) well-established precedent and is clearly erroneous and prejudicial; and

2. The Hearing Officer's Decision that Olney Charter was not created directly by the State so as to constitute a department or administrative arm of the government raises a substantial question of law and policy due to a clear departure from the Board's well-established precedent and is clearly erroneous and prejudicial; and

3. The Hearing Officer's Decision that Olney Charter was not administered by individuals responsible to government officials raises a substantial question of law and policy due to a clear departure from the Board's well-established precedent and is clearly erroneous and prejudicial.

Well-established Board precedent has interpreted the meaning of a "political subdivision" to include entities that are (1) created directly by the state so as to constitute governmental departments or administrative arms; or (2) administered by individuals who are responsible to officials or the general electorate. See e.g., NLRB v. Natural Gas Util. Dist. of Hawkins Cnty., 402 U.S. 600 (1971) ("Hawkins County"). Entities that are political subdivisions are exempted from the Act and the Board has no jurisdiction over such entities. Id. at 604-05; see also Charter Sch. Admin. Servs., Inc., 353 N.L.R.B. 35 (2008) ("CSAS"). In his decision, the Hearing Officer

ignored this longstanding test. The Hearing Officer misapplied both analytical prongs of the *Hawkins County* test, finding that a public school established and operated under a charter issued by the Commonwealth of Pennsylvania and operating pursuant to the District's Renaissance Initiative Policy is allegedly created by private individuals rather than the state and lacks sufficient governmental involvement in its operations to qualify as a "political subdivision." Moreover, the Hearing Officer ignored the Board's instructions in Chicago Mathematics & Science Academy Charter School, Inc., 359 NLRB 41, at *1 (2012)("CMSA") whereby the Board made clear that it "certainly [did] not establish a bright-line rule that the Board has jurisdiction over entities that operate charter schools, wherever they are located and regardless of the legal framework that governs their specific relationships with state and local governments."

The Hearing Officer's Decision departed from precedential Board decisions when determining that a public renaissance charter school was not a "political subdivision." The Decision ignored the instructions in *CMSA* by failing to find that Olney Charter was created by the state despite clear evidence that Olney Charter, like other public schools, was created by the Commonwealth of Pennsylvania and would not and could not exist separate and apart from the Department of Education ("Dept. of Ed."). The Decision also erroneously applied the second prong of the *Hawkins County* test and ignored the unambiguous legislative intent of both the Charter School Law and the Pennsylvania Public School Code when it determined that Olney Charter's BOT were not public officials, despite the clear statutory definition of trustees as public officials and the instructions in *Hawkins County* which requires the examination and careful consideration of a state's characterization and interpretation of an entities public or private status. *See* 24 P.S. §17-1715-A(11); 65 Pa. Cons. Stat. Ann. § 1102 (West).

Furthermore, the Hearing Officer’s conclusion that Olney Charter is not an arm or department within the Commonwealth of Pennsylvania’s public education system is clearly erroneous and substantially prejudices Olney Charter. As explained more fully herein, it is clear that under the Charter School Law, 24 P.S. §17-1701-A *et seq.*, charter schools like Olney Charter are intended to function as part of the Commonwealth’s public school system. Olney Charter is a public employer and a part of the public education system operating under the same laws applicable to public schools within the Commonwealth of Pennsylvania. Both legislative intent and applicable law dictates that Olney Charter—a public renaissance charter school—should be treated as an arm of the government. There is no justifiable basis for ignoring the clear legislative framework of charter schools in Pennsylvania—an area traditionally reserved for the state to regulate—and Olney Charter’s classification as a renaissance charter school. Both of the aforementioned factors unequivocally support the conclusion that Olney Charter is a political subdivision exempt from the jurisdiction of the NLRA.

For these and the other reasons set forth below and in the accompanying Exceptions, the Decision should be reversed.

II. PROCEDURAL HISTORY

On March 20, 2015 the Alliance of Charter School Employees, Local 6056, AFT-PA, A (“Union” or “Petitioner”) filed a representation petition with Region 4 of the NLRB seeking to hold a union election for the following Bargaining Unit:

Unit A (Professional Unit): All full-time and regular part-time professional employees, including teachers, co-teachers, psychologists, counselors, deans, instructional assistants/aides, special education paraprofessionals, in-house substitute teachers, nurses, and librarians employed by the Employer at its 100 W. Duncannon Street, Philadelphia, PA educational facility.

Unit B (Non-Professional Unit): All full-time and regular part-time non-professional employees, including truancy liaisons, mentor coordinators, transition assistants, and

administrative assistants employed by the Employer at its 100 W. Duncannon Street, Philadelphia, PA educational facility.

On April 3, 2015 the parties entered into a Stipulated Election Agreement and an election was held on April 30, 2015. The Tally of Ballots resulted in a 104 of the employees voting in favor of the Union, 38 employees voting against the Union and 16 non-determinative challenged ballots.

On May 7, 2015, Olney Charter filed Objections to the Election challenging the NLRA's jurisdiction because Olney Charter is an exempt political subdivision. The parties entered into a Joint Stipulation of Facts, adopting the arguments made and testimony and evidence presented in the prior case of John B. Stetson Charter School, an ASPIRA of PA School, Case 04-RC-150011.²

On June 29, 2015, a hearing was held before Hearing Officer William Slack for the limited purpose of receiving into evidence the formal papers in this case. The parties subsequently submitted post-hearing letter briefs on July 7, 2015 addressing several limited issues related to the content of the Joint Stipulation of Facts. The Hearing Officer's Report on Objections was issued on July 8, 2015, and Olney Charter's Exceptions to the Decision and Proposed Order of Hearing Officer now follows.

III. ENABLING LEGISLATION

Olney Charter is a non-profit corporation incorporated for the sole purpose of providing basic education for students in the Philadelphia area. (Ol. Bd. 2). By both statute and well-reasoned case law precedent, Olney Charter is a public school within the Commonwealth of Pennsylvania's public school system. The Hearing Officer's contrary conclusion is both erroneous and in direct conflict with the unambiguous intent of Pennsylvania's legislature.

² Transcript and exhibit citations are to the record in Case 04-RC-150001 unless specifically designated as an Olney Charter exhibit, hereinafter referenced as (Ol. Bd. ____).

The Constitution of the Commonwealth of Pennsylvania requires that the Commonwealth provide a thorough and efficient system of public education. Pa. Const. art. III, § 14. To effectuate this mandate the Commonwealth's General Assembly enacted legislation concerning public education, collectively referred to as the Public School Code of 1949 (the "Code"), 24 P.S. §§1-101 *et seq.* The Code is implemented through the Commonwealth's Board of Education ("Board of Ed.") and the Department of Education of the Commonwealth ("Dept. of Ed."). 22 Pa. Code §§1.1-1.6. The Board of Ed. has the power and duty to review and adopt regulations that govern educational policies and principles; and is charged with establishing standards governing the Commonwealth's educational programs. 22 Pa. Code. §1.2.

Statements of policy, standards, rules and regulations promulgated by the board shall be binding upon the Department of Education. The department shall submit to the board for approval, modification or rejection, all rules and regulations proposed by the department in the areas under the control of the board. The Department of Education shall furnish upon request of the board such data and information as the board may, from time to time, require, and the department shall provide administrative services for and on behalf of the board for the implementation of the board's statements of policy, standards, rules and regulations.

24 P.S. §26-2606-B (emphasis added).

Through the authority vested in the Dept. of Ed. and the Board of Ed. to oversee the Commonwealth's public education system, Pennsylvania has created and authorized charter schools to provide public education to residents of the Commonwealth. The rules and regulations governing charter schools are compiled as the Charter School Law, 24 P.S. §17-1701-A *et seq.* The legislature has expressly defined charter schools as "public school[s.]" 24 P.S. §17-1703-A. It was the clear intent of the General Assembly that charter schools serve as public schools, intended to "provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system." 24 P.S. §17-1702-A(5).

In short, the Dept. of Ed. has the authority from the Commonwealth to implement regulations and policies to achieve the constitutional mandate that the Commonwealth provide a system of public education. Pa. Const. Art. III, §14. This implementation of the public education system by the Dept. of Ed. is then supervised by the Pennsylvania Secretary of Education, who is directly appointed by the Governor of the Commonwealth, and who serves as both the head of the Dept. of Ed. and the chief executive officer of the Board of Ed.

As a charter school, Olney Charter is mandated by law to operate in accordance with detailed statutory and regulatory policies and procedures. *See* 24 P.S. §17-1701 *et seq.*; Ex. 2-3, 7. Moreover, as discussed in further detail within, Olney Charter is a renaissance charter school with a robust special education program heavily regulated and supervised by the District; the government is therefore more pervasively involved in Olney Charter's administration and operations. As *CMSA* makes clear, the Board must consider the legal framework in which Olney Charter operates. Additionally, a determination that a **public** school is a private employer has far reaching consequences which the Board should carefully consider when rendering its decision. As a public high school, Olney Charter falls squarely into the standard articulated in the *Hawkins County* test because it is a public school created by the Commonwealth, functions as an arm of the Dept. of Ed. to provide public education to Philadelphia students and is administered by individuals who are responsible to officials or the general electorate. Olney Charter therefore meets the definition of a "political subdivision" within the meaning of Section 2(2) of the Act and is exempt from the NLRB's jurisdiction.

The intent of Pennsylvania legislature is clear and unambiguous, charter schools were intended to be educational options or alternatives **within** the public school system. *See* 24 P.S. §17-1702-A(5). From their inception, charter schools have been treated, considered and

regulated as part of the Commonwealth's public education system as an arm of the state (*i.e.*, a political subdivision of the Dept. of Ed.). Moreover, under the Code and Renaissance Initiative Policy, the Department directly oversees the public education system, including charter schools, and specifically allows for the creation **and** ongoing authorization and constant oversight of renaissance charter schools. (Ex. 2); *see also* 24 P.S. §17-1701 *et seq.*

Additionally, the Commonwealth's involvement in renaissance charter schools is much more direct than its association with traditional charter schools because the Renaissance Initiative Policy mandates pervasive and direct oversight. (Ex. 2.) Renaissance charter schools, even more so than traditional charter schools, operate and function as public schools:

[t]he first thing I would highlight, though, is that a Renaissance school is a school district public school and it serves districts in the surrounding neighborhood. I think it's a very unique feature of the Renaissance schools. What had been happening in Philadelphia over a number of years was that charter schools had grown up at this point in time when this initiative was put in place in 2010, approved by the SRC [School Reform Commission], there were probably about 69 charter schools or so. And they took students from all over the city. And what the superintendent in the SRC wanted to do in this case was to keep these schools as neighborhood schools, even though some of them would become charters; they still had to remain as neighborhood schools. So that's one of the unique features.

(Tr. 27:10-22.) Moreover, the guidance and compliance regulations articulated in the Renaissance Initiative Policy are specifically **only** applicable to renaissance charter schools (rather than traditional charter schools). (Ex. 2.) Like its public school siblings, renaissance charter schools must comply with residential and geographic limitations, unlike traditional charter schools:

[w]ith that type of enrollment approach, again following the same neighborhood policy of the School District of Philadelphia, it's very, very different than other charters who you can apply to wherever you live in a school district, and you can get enrolled up to the point where the school is overenrolled, at which time they start admitting people by lottery.

(Tr. 58:14-20.) The unambiguous language of the Charter School Law makes clear that the Commonwealth intended for charter schools to be public schools that provide additional educational opportunities for both parents and staff within the state's public school system. Olney Charter's status as a provider of special education services to students throughout the District is further evidence that Olney Charter is a public school. (Ol. Bd. 1). Olney Charter's charter agreement specifies that the school must provide special education services and autism and life skills programs. (Ol. Bd. 1). The charter agreement further provides that the District may assign students from outside of Olney Charter's geographic area to the autism and life skills program. (Ol. Bd. 1). Moreover, the Renaissance Initiative Policy enacted by the District—an "arm" of the Commonwealth—mandates more comprehensive involvement and oversight by the state than usually applicable to traditional charter schools. Indeed, it is important to point out that these schools, which are under the control of the SRC, are restricted under Pennsylvania law from engaging in strike activity. 24 P.S. § 6-696(1). Due to the nature of the legal framework—both the Code and the Renaissance Initiative—governing renaissance charter schools, Olney Charter is directly intertwined with and regulated by the Commonwealth.

IV. FACTS INTRODUCED PURSUANT TO THE JOINT STIPULATION OF FACTS

The evidence presented during the John B. Stetson Case ("Stetson Case") and subsequently adopted into the record in this instant matter constitutes substantial evidence of Olney Charter's status as an exempt political subdivision. Contrary to the Hearing Officer's Decision, Olney Charter was created by and exists solely because of the Commonwealth:

[Olney Charter] was originally a school district of Philadelphia Public School...[re]mained a public school through the current operation by ASPIRA. However, as part of the -- what the District called its "Renaissance Initiative," the school came under the operation of ASPIRA.

(Tr. 25:2-7.)

As a renaissance charter school, Olney Charter was created pursuant to the Renaissance Initiative Policy and is a public school whose governance must comply with the Charter School Law and added compliance mandates of the Renaissance Initiative. (Ex. 2.) Unlike traditional charter schools, as a renaissance charter school, Olney Charter has increased accountability to the Commonwealth and “[t]he Superintendent or her designee [must] evaluate Renaissance charter schools annually to monitor the progress and performance of at the school and compliance with the goals and targets listed in the charter agreement.” *Id.* Additionally, as a renaissance charter school, Olney Charter stands in stark contrast to traditional charter schools because Olney Charter’s teachers are restricted from engaging in strike activity during the school year. 24 P.S. § 6-696(1).

It is also clear from the record that Olney Charter evolved *after* Olney High School was identified as a renaissance eligible school:

So, as part of the way that the School District of Philadelphia and the SRC approve charters, there needs to be an existing entity and the SRC asked the charter school office to ask the turnaround teams to incorporate the entity that would then be contracted with. And so the only thing that existed at that time were the turnaround teams.

(Tr. 75:21-25—76:1.)

Moreover, it is clear that the Commonwealth intended for Olney Charter to be fully integrated into the District’s public education system. (Tr. 62:7-25—63:1-18.)

As a renaissance charter school, Olney Charter is under increased regulatory requirements. In addition to the requirements imposed by the Charter School Law and regulations applicable to public schools throughout the Commonwealth, the Renaissance Initiative Policy requires increased government participation, specifically, the ability of the District to assign students from throughout the District to Olney Charter’s autism and life skills

program. (Ol. Bd. 1). The District's involvement in selecting and authorizing students to attend Olney Charter is a unique feature that distinguishes Olney Charter from other renaissance charter schools and further supports Olney Charter's status as a District controlled public school.

The increased regulatory oversight, governmental involvement in the school's operations and the mandated compliance applicable to renaissance charter schools renders Olney Charter an exempt political subdivision.

V. LEGAL ARGUMENT

Olney Charter was created directly by the Commonwealth of Pennsylvania and continues to operate only through, and as a part of, the Dept. of Ed. Olney Charter is also administered by public officials within the Commonwealth, including the District, acting through the School Reform Commission (the "SRC") and the School Advisory Council (the "SAC"). 24 P.S. §17-1701-A *et seq.*; (Ex.2-3).³ Further, the members of Olney Charter's Board of Trustees ("BOT") are public officials by legal definition and are ultimately responsible for the administration of Olney Charter. 24 P.S. §17-1727-A. Additionally, the administration of Olney Charter is accountable to public officials. (Ex. 2-3).⁴

In light of Olney Charter's creation, operations, administration and the legal framework governing it, Olney Charter is not subject to the jurisdiction of the Board because it is a "political subdivision" exempt from the Act pursuant to Section 2(2). The Board's longstanding definition

³ Employer excepts to the Hearing Officer's conclusion that the SAC functions merely in an advisory capacity.

⁴ Pursuant to the Public Employee Relations Act, Olney Charter's employees constitute public employees, which are defined in the act as "any individuals employed by a public employer..." 43 P.S. §1101.301. A **public employer includes the "Commonwealth of Pennsylvania, its political subdivisions including school districts** and any officer, board, commission, agency, authority, or other instrumentality thereof **and any nonprofit organization** or institution and any charitable, religious, scientific, literary, recreational, health, **educational or welfare institution receiving grants or appropriations from local, State or Federal governments. . ."** See 43 Pa. Stat. Ann. §1101.301. As discussed *infra*, Olney Charter constitutes a public employer because, by definition, it is a political subdivision of Pennsylvania and its administration is accountable to public officials. Furthermore, as public employees, 24 P.S. §17-1724A(c) mandates that all employees of Olney Charter "shall be enrolled in the Public School Employee's Retirement System..." ("PSERS").

of “political subdivision” articulated in the two-prong *Hawkins County* test is controlling. An entity can be classified as a political subdivision even if it only satisfies one prong of the *Hawkins County* test. Olney Charter is a political subdivision of the Commonwealth of Pennsylvania and fits squarely within the standards articulated in *Hawkins County*.

As noted in above, the NLRB previously considered the issue of whether an Illinois charter school was an exempt political subdivision in the case of *CMSA*. In *CMSA*, the Board held that a non-profit corporation that established and operated a charter school in Illinois was not a political subdivision. *CMSA*, 353 N.L.R.B., at *6. Here, the difference between Pennsylvania law and Illinois law, coupled with Olney Charter’s classification as a renaissance charter school operated under both Pennsylvania law and the District’s Renaissance Initiative makes the instant matter highly distinguishable. As a result of the aforementioned distinctions, it is evident that the Board lacks jurisdiction over Olney Charter.

A. In Re Chicago Mathematics & Science Academy Charter School, Inc. Is Factually Distinguishable

Under the *Hawkins County* test, entities that are (1) created directly by the state so as to constitute governmental departments or administrative arms; or (2) administered by individuals who are responsible to officials or the general electorate are exempted from the Act and the Board has no jurisdiction over such entities. *Hawkins County*, 402 U.S. at 604-05.

Applying the above criteria, the Board concluded that CMSA failed to meet the first analytical prong of the *Hawkins County* test because it was not created directly by any government entity, statute or public official. The Board ruled that the charter school was a private non-profit entity established by private individuals pursuant to the Illinois General Not-for-Profit Act because the employer did not create a charter school until *after* the private entity

was established and incorporated. *CMSA*, 359 NLRB at *6. The Board also found that the charter school did not meet the second analytical prong because it was not administered by individuals who were responsible to public officials or the general electorate because the members of the charter school's board of directors were neither appointed by nor subject to removal by public officials. *Id.* at *8-10.

Despite concluding that *CMSA* was not a political subdivision under the *Hawkins County* test, the Board made clear that its ruling “certainly [did] not establish a bright-line rule that the Board has jurisdiction over entities that operate charter schools, wherever they are located and regardless of the legal framework that governs their specific relationships with state and local governments.” *Id.* at *1.

The Hearing Officer's conclusion that Olney Charter was created by a private entity is clearly erroneous and prejudicial. (Dec. 7). In *CMSA*, the Board relied heavily on the timing of the charter school's creation. In the instant matter, Olney Charter was incorporated and created *after* Olney High School was identified as a renaissance eligible school because it was identified by the District as one of its chronically underperforming schools. (Tr. 28:2-8). Moreover, the incorporation process was completed at the direction of the District:

So, as part of the way that the School District of Philadelphia and the SRC approve charters, there needs to be an existing entity and the SRC asked the charter school office to ask the turnaround teams to incorporate the entity that would then be contracted with. And so the only thing that existed at that time were the turnaround teams.

(Tr. 75:21-25—76:1-3).

Olney Charter was incorporated for the express purpose of providing public educational services. (Ol. Bd. 1). Unlike the charter management organization in *CMSA*, Olney Charter was created *solely* for educational purposes. (Ol. Bd. 1). Contrary to the Hearing Officer's findings, if Olney

Charter—as a public school—lost its charter (via revocation or nonrenewal), at any time, the non-profit entity would cease to exist and the school would revert back to being a renaissance eligible school. (Tr. 44:16-21.) The Articles of Incorporation further reflects that Olney Charter is a *public* non-profit that is accountable to the taxpayers of the Commonwealth of Pennsylvania operating *exclusively* for educational purposes. (Ol. Bd. 1). The aforementioned distinctions are substantive and dispositive.

It is important to note that the decision in *CMSA* was expressly limited to Illinois law, specifically the Illinois General Not-for-Profit Act. Moreover, there are important substantive distinctions between the Illinois Charter Schools Law, 105 ILCS 5/Art. 27A *et seq.* and the Pennsylvania Charter School Law, 24 P.S. §17-1701-A *et seq.*

1. Olney Charter Satisfies The First Prong Of The Hawkins County Test Because Olney Charter Was Created Directly By The Commonwealth Of Pennsylvania So As To Constitute A Department Or Administrative Arm Of The Government

The Board has routinely found employing entities to be exempt political subdivisions where they were created pursuant to legislation or statute in order to discharge a state function *See e.g., New York Institute for Education of the Blind*, 254 NLRB 664 (1981); *The New Britain Institute*, 298 NLRB 862 (1990). Unlike the charter school in *CMSA*, Olney Charter shares the key characteristics of political subdivision status with those entities that the Board has found to be exempt because Olney Charter was created by the Commonwealth, functions as an arm of the state and is administered by individuals beholden to the state or general electorate.

Contrary to the Hearing Officer’s conclusion, Olney Charter is not *merely* acting as a government contractor. (Dec. 8). Rather, the Commonwealth was the active force behind the creation of Olney Charter because the school was created pursuant to Pennsylvania’s Charter

School Law and at the express directive of the District through its Renaissance Initiative. (Tr. 25:8-23.) The Hearing Officer's Decision discounts the unique creation of renaissance charter schools and the special legislative act (i.e., the Charter School Law) which directly created charter schools in the Commonwealth. Olney Charter is a public school and is therefore an "arm" of the Commonwealth of Pennsylvania carrying out the state function of providing public education, not a government contractor.

Pennsylvania law specifically permits the creation of charter schools through the conversion of an existing public school. 24 P.S. §17-1717-A(b)(1). Additionally, charter schools are established, authorized and renewed by the District, which operates at the express direction of the Dept. of Ed. 24 P.S. § 17-1729-A. In addition to the special enabling legislation of the Pennsylvania Charter School Law, Olney Charter is a renaissance charter school created through the District's Renaissance Initiative. (Tr. 25:2-14.)

The Renaissance Initiative was launched in January 2010 for the express purpose of reforming low performing public schools. (Ex.7.) Only fourteen (14) schools were identified as renaissance eligible schools. (Ex 7.) Unlike de novo charter schools, Renaissance Charter Schools are required to continue to serve as neighborhood schools with a defined geographic boundary for assigning students:

And then in terms of student assignments, probably the most fundamental difference this Renaissance Initiative sought to create, the schools that are authorized by the Pennsylvania Charter School law traditionally take students via open admissions process and also lottery once they were full. But for Renaissance charters, this is again very key, there had to be no barriers to admission. It's a public school, a neighborhood school, and so it was only -- the Renaissance charters are only allowed to accept students and admit students from their catchment area. So again, very different than normal charter schools.

(Tr. 31:19-25—32:1-4.) As part of the Renaissance Initiative, the District recruited and selected turnaround teams who were qualified and highly capable of turning around and managing

schools in Philadelphia. (Ex. 7.) Additionally, the District provided funds and resources to facilitate the transition of the school into a renaissance charter school. (Ex. 7.) The District expressly defines renaissance schools as public schools. (Ex. 2.) The Renaissance Initiative is a critical distinction between *CMSA* and the instant matter.

The Hearing Officer's Decision incorrectly concluded that "Employer is no different...than any other corporate subsidiary created to perform under a single contract." (Dec. 8). In reaching this conclusion, the Hearing Officer relied on *PA Cyber*, which previously rejected the argument raised by traditional charter schools that the issuance of a charter from the Commonwealth meant that the school was created by the state. However, the Decision misconstrues and completely ignores essential and substantive elements evidencing that Olney Charter was "created" by the Commonwealth. Olney Charter is uniquely situated and distinguishable from the traditional charter schools at issue in *PA Cyber* and *PA Virtual*. The Hearing Officer's Decision failed to carefully consider and give proper weight to the differences between a traditional charter school and a renaissance charter school.

The applicability of the Renaissance Initiative Policy is an important distinction between Olney Charter and traditional charter schools. As a result of the Renaissance Initiative, Olney Charter is part of the public education system, operating directly through its charter issued by the District. (Tr. 25:8-23.; Ex. 3.) For this pivotal reason alone, Olney Charter meets the requirements of a political subdivision under the first prong of the *Hawkins County* test because it was created directly by the Commonwealth of Pennsylvania.

It is also critical to note that the "arm" of the Dept. of Ed., acting through the District, "reaches" Renaissance Charter Schools in a much more direct and pervasive way. (Ex. 2.) Another drastic difference between traditional charter schools and Renaissance Charter Schools

is that the District developed charter agreements specifically addressing the additional requirements and heightened District oversight of Renaissance Charter Schools. (Tr. 38:2-9.) Unlike traditional charter schools, Olney Charter’s charter agreement with the District includes provisions outlining requirements for student enrollment from within a defined neighborhood area, provision of autism and life skills programs for special needs students throughout the District as assigned by the District, stringent academic requirements, routine data reporting, grade configuration and facility specifications. (Ex. 2-3; Tr. 37:25—38:1-9.) The District intended for renaissance charter schools to operate as public schools:

In the City of Philadelphia, charter schools that are *de novo* charter schools starting on -- by the -- using the Pennsylvania Charter School law, they have to go out and find their own building...a turnaround team for a Renaissance charter is mandated to continue to use the same school district public school that the school was operating in, because fundamentally what was happening is the only thing that was changing was who was going to oversee the day-to-day operation. The kids were going to stay the same. So, again, it stayed a neighborhood school, so that is radically different than other charter schools.

(Tr. 39:3-14.) Additionally, the charter can be revoked **at any time** if Olney Charter fails to meet performance expectations. (Ex. 3; Tr. 48:22-25—49:1.)

Olney Charter’s public school status is further supported by its full integration into Philadelphia’s public school system. Olney Charter is listed on the District’s website as a public school within a defined catchment area. (Tr. 61:10-25—62:1-6.) The students at Olney Charter are pulled from the feeder schools in a defined area. The terms of Olney Charter’s charter agreement clearly delineate that Olney Charter is a public school that **must** “enroll all students who in the immediately prior school year attended feeder schools for the Olney High School.” (Ol. Bd. 1). Like other public schools in the District, Olney Charter’s students **must** come from the school’s catchment area—specifically, the students at Olney Charter are pulled from the

following public schools: Olney Elementary, Feltonville, Burney, Marshall, Morrison, Cooke and Clemente.

Mr. Darden testified to the unique enrollment approach that renaissance charter schools, like Olney Charter, must adhere to:

So at [Olney], with that type of enrollment approach, again following the same neighborhood policy of the School District of Philadelphia, it's very, very different than other charters who you can apply to wherever you live in a school district, and you can get enrolled up to the point where the school is overenrolled.

(Tr. 58:14-19.)

Like other public school students, all students who attend Olney Charter are tracked through the District's Office of Student Enrollment and Placement:

What I [Director of Strategic Programs, School District of Philadelphia] really instructed all other schools in the district was, do not accept a student from [Olney] if their address by boundary said they should be a [Olney] student. So we [the District] forbid any other school in the district from taking in neighborhood students, because again, we [the District] wanted the neighborhood enrollment -- we [the District] wanted to become a better school and to be a neighborhood school and to have more students from the neighborhood attending the school. And so we [the District] made sure that those processes were put in place at student placement, and instructed all principals, if you see a student who really should be at [Olney], stop, call student placement, who called the charter school office, and we intervened and were sure that enrollment was happening as a true neighborhood school.

(Tr. 60:13-25—61:1-6.) For these reasons, a Renaissance Charter School such as Olney Charter meets the first prong of the *Hawkins County* test because it functions as a public school within the District.

Similar to a traditional public school, Olney Charter is considered a local educational agency ("LEA"). As a LEA, Olney Charter is eligible for and receives various public funds, including federal educational funds:

So pursuant to the Pennsylvania Charter School law, charter schools received a per pupil payment based on a formula that each local education agency, in this

case the School District of Philadelphia, completes, and that analysis is basically one in which they look at their budget from the last year, see what they spent on all public school students in the city, and then deduct some non-school expenses like debt service and things like that, and come up with a per pupil -- an amount that will then be paid for students -- public school students who go to charter schools.

(Tr. 113:6-15.) If Olney Charter was not a part of the public school system, it would not be eligible to receive federal grant monies and other funding under the Individuals with Disabilities Education Act (IDEA), Title I and Title II of the No Child Left Behind Act (NCLB). (Tr. 113:4-15.) As an LEA, Olney Charter receives federal education funding through the Commonwealth of Pennsylvania. Olney Charter's recognition as an LEA is further proof that Olney Charter operates as part of the public school system.

Olney Charter's status as an exempt political subdivision within the meaning of the *Hawkins County* test is further reflected in the Pennsylvania Commonwealth Court's seminal case of Warner v. Lawrence, 900 A.2d 980 (Pa. Commw. Ct. June 2, 2006), which affirmed a lower court's ruling that "charter schools are the creation of the legislature."⁵ In *Warner*, a minor brought a negligence action against a Pennsylvania charter school for personal injuries suffered while on the school's premises. The Court held that (1) a charter school established under Pennsylvania's Charter School Law was entitled to immunity under the state's Tort Claims Act in the same manner as political subdivisions and local agencies, and (2) the legislature's grant of immunity to the charter school did not violate the Open Courts provision of the Pennsylvania Constitution. Warner, 900 A.2d at 984-89.

⁵ The impact of the *Warner* decision should not be lessened by the Third Circuit's unpublished and therefore non-precedential ruling in Pocono Mt. Charter Sch. v. Pocono Mt. Sch. Dist., 442 F. App'x 681 (3d Cir. 2011) that the language in Section 1714—A of Pennsylvania's Charter School Law stating a charter school may "sue and be sued to the same extent and upon the same condition that [a] political subdivision[... can be sued]" does not equate to a charter school being a political subdivision. See Pocono Mt. Charter Sch., 442 F. App'x at 686. Upon that determination, Judge Rendell reversed the district court's ruling based (apparently solely) on its interpretation of the above-referenced statute.

The Charter School Law makes clear that charter schools are exempt from certain regulatory requirements, but are not otherwise exempt from statutes applicable to public schools. 24 P.S. §17-1715-A(1). In light of the added requirements applicable to Renaissance Charter Schools, the relationship between renaissance charter schools and public schools are so closely intertwined as to be functionally identical. For the foregoing reasons, Olney Charter meets the first prong of the *Hawkins County* test because it is a public school under the “arm” of the Dept. of Ed.

2. Olney Charter Satisfies The Second Prong Of The Hawkins County Test Because Olney Charter Is Administered By Individuals Who Are Responsible To Public Officials Or The General Electorate

Contrary to the Hearing Officer’s Decision, Olney Charter likewise meets the second prong of the *Hawkins County* test because it is administered by individuals who are not only responsible to public officials but who are themselves deemed by statute to be public officials. Departing from the express directive in *Hawkins County* which mandates that careful consideration be given to state law declarations and interpretations, the Hearing Officer ignored the clear intent of the Pennsylvania legislature. *Hawkins County*, 402 U.S. at 601.

Pennsylvania Charter School Law clearly states that “**trustees of a charter school shall be public officials.**” 24 P.S. §17-1715A(11). This is yet another critical distinction from the facts in *CMSA* because no such provision exists in the Illinois Charter Schools Law. In *CMSA*, the Board found the BOT to be comprised of private individuals. In the instant matter, that is not and cannot be the case. The Pennsylvania legislature in its creation of charter schools has unambiguously dictated that the BOT of Pennsylvania charter schools are public officials.⁶

⁶ While federal law ultimately determines whether an entity is a political subdivision under the Act, state interpretations of an entity’s public or private status is instructive and must be given careful consideration. *Hawkins*

The administration of Olney Charter by public officials is two-fold: (1) the BOT—comprised entirely of public officials as defined by Pennsylvania law—directly administers Olney Charter; and (2) the public officials on Olney Charter’s BOT are also directly overseen and accountable to other public officials or individuals responsible to the general electorate, specifically the Superintendent and Secretary of Education.

Additionally, Olney Charter’s very creation was a public process, unlike the creation of tradition charter schools in Pennsylvania. As Mr. Darden testified, the selection of a charter management team and the authorization of Olney Charter’s charter required the approval and feedback of city officials and the neighborhood that Olney Charter would be serving:

It also had a public process. So [Olney] being a neighborhood public school, it had a group of parents that would be involved in the process per this policy to help select the team, again turnaround teams from the definitions, that would be selected for their school. So again, very different than normal charters in the way they get formed. After teams were vetted, you know, through an RFP process, again, there was this public process where they would go out and present themselves to [Olney’s] community and be recommended to the superintendent. The superintendent then would make a final recommendation to the SRC, and the SRC would then take a vote.

(Tr. 28:19-25—29:1-5.)

3. Olney Charter’s Board Of Trustees Is Comprised Of Public Officials Who Are Directly Overseen And Accountable To Other Public Officials In The Commonwealth Of Pennsylvania

The members of Olney Charter’s BOT are public officials by legal definition under both the Charter School Law and the Ethics Act. 24 P.S. §17-1715-A(11); 65 Pa. Cons. Stat. Ann. §1102. The BOT therefore consists of public officials who administer Olney Charter. For this reason alone, Olney Charter satisfies the second prong of the *Hawkins County* test. In rendering

County, 402 U.S. at 602. It flies in the face of reason for the Hearing Officer to categorically deny the explicit legislative mandates and intent of the Commonwealth as to the issue of Olney Charter’s BOT being public officials.

his decision, the Hearing Officer committed a prejudicial error by failing to give careful consideration to the obligations imposed on Olney Charter's BOT through the Ethics Act.

In addition to the composition of Olney Charter's BOT, the administration of the school is also directly accountable to public officials of the Commonwealth. First, the BOT of Olney Charter is closely overseen and regulated by the Dept. of Ed. through the Superintendent. (Tr. 30:4-20.) The District and Superintendent maintains the right to authorize, renew and/or revoke Olney Charter's charter agreement and provides direct oversight of Olney Charter on an ongoing and continuous basis. Additionally, the express terms of the charter agreement vests the authority in the District to assign special needs students from public schools throughout the District to Olney Charter's autism and life skills program.

Olney Charter annually reports to and is directly overseen by the District through the mandated annual filing of the school budget, annual audit report, student expulsion and disciplinary report and the report of the students' progress towards the performance agreement with Pennsylvania's Secretary of Education. (Ex. 3); *see also* 24 P.S. §17-1728-A. This reporting requirement is more than just ministerial; rather, the reporting is an essential and substantive component of the intertwined relationship between the District and Olney Charter. The information in the audit report contains the same detailed information mandated by the Dept. of Ed. for other public schools. Additionally, the Dept. of Ed. regularly reviews Olney Charter's finances, operations and educational program. Id. The Dept. of Ed. also has the right to conduct on-site visits and Olney Charter is required to provide the District open access to its records. Id.

The Dept. of Ed.’s ability to immediately revoke a Renaissance School’s Charter, by its own directive or by the recommendation of the SAC,⁷ which would effectively put the charter school out of existence, is further evidence that Olney Charter meets the “responsible to” requirement in the second analytical prong of the *Hawkins County* test. It is clear from the additional mandates that a Renaissance Charter School must adhere to the added oversight and that the Dept. of Ed. exercises more power and oversight over Olney Charter than it wields over traditional charter schools.⁸

4. The Legal Framework Of Pennsylvania’s Charter School Law Requires That The Public Officials Who Serve On Olney Charter’s Board Of Trustees Maintain Control Over Charter School Administration

Olney Charter was established under Pennsylvania law as a **public non-profit** organized solely for educational purposes, accountable to taxpayers in the Commonwealth of Pennsylvania. (Ol. Bd. 1). Unlike the trustees in the CMSA case, by Pennsylvania statute, the trustees of Olney Charter—as an independent public school—are public officials. 24 P.S. §17-1715-A(11)-(12). Pennsylvania’s Charter School Law mandates that Olney Charter’s BOT be comprised entirely of public officials. 24 P.S. §17-1715-A(11). The Charter School Law further empowers the public officials on the BOT with:

“the authority to decide matters related to the operation of the school, including, but not limited to, budgeting, curriculum and operating procedures, subject to the school's charter...[and] the authority to employ, discharge and contract with necessary professional and nonprofessional employees subject to the school's charter and the provisions of this article...”

⁷ Here, Olney Charter excepts to the Hearing Officer’s conclusion that the SAC serves only in an advisory capacity. (Dec. 5). The power vested in the SAC permits it to recommend revocation nor nonrenewal of the charter agreement at any time during the term of the charter.

⁸ Charter schools in Pennsylvania must also comply with many of the same laws applicable to Pennsylvania’s traditional school districts. (Ex. 3); see also 24 P.S. §17-1732-A.

24 P.S. §17-1715-A(a). The statutorily mandated composition of Olney Charter's BOT and its authority to administer and oversee the operations of the school clearly satisfies the second analytical prong of the *Hawkins County* test.

Moreover, as dictated by Pennsylvania law, the members of Olney Charter's BOT are public officials. Contrary to the Hearing Officer's finding that the majority of Olney Charter's BOT must be appointed by ASPIRA, Mr. Darden provided testimony that the bylaws were changed by vote of the BOT almost three (3) years ago, vesting sole appointment authority in the current members of the BOT, whom are all public officials pursuant to Pennsylvania law. (Dec. 9; Tr. 84-85; 101). Olney Charter's BOT has the power to remove or appoint trustees. (Tr. 85:1-8.) The members of the BOT exercise this removal and appointment power in *their capacity as public officials* and not as private citizens.

Pursuant to the Pennsylvania Sunshine Act, 65 Pa. C.S.A. §701 et seq., the public officials serving as members of a charter school's BOT must vote during public session at a publically-advertised meeting when conducting any official business, which includes election of new board members or new public officials. 65 Pa. C.S.A. §§ 704, 705.

The members of Olney Charter's BOT can only be removed by other trustees. (Px. 2; Tr. 101:8-17) In addition, as public officials, the members of the BOT and the chief school administrators, who report directly to the BOT, are legally required to take various actions that are applicable to public officials or public employees under Pennsylvania law, including the Ethics Act. Pennsylvania's entire legal framework for charter schools is a scheme whereby the charter school's BOT has heavy obligations and responsibilities because its members are public officials, providing a public education to students of the Commonwealth.

The public officials that comprise Olney Charter’s BOT have direct and extensive oversight over the day-to-day operations of the school. (Tr. 102:6-8.) Specifically, the BOT oversees all Olney Charter employees. *Id.* Moreover, the public officials of Olney Charter’s BOT are also responsible for establishing all of the policies and procedures under which Olney Charter operates. (Ol. Bd. 1.)

As a result of the administration of Olney Charter by public officials, the school is a “political subdivision” of the Commonwealth of Pennsylvania and is therefore not subject to the Board’s jurisdictions. Despite Counsel for the Petitioner’s attempts to argue that no members of Olney Charter’s BOT are public officials, his assertions are both inaccurate and contrary to the unambiguous provisions of the Charter School Law and the longstanding standard articulated in the second analytical prong of the *Hawkins County* test. While Olney Charter’s BOT is undoubtedly comprised of public officials as defined by the Charter School Law, the second prong of the *Hawkins County* test only requires that the charter school be **administered** by public—not necessarily elected—officials. For the aforementioned reasons, Olney Charter is administered by public officials as expressly defined within the Charter School Law and the Ethics Act. 65 P.S. § 1102; 24 P.S. 17-1715-A(11). Further, the Code, Charter School Law and Olney Charter’s own Bylaws delineate all of the manners in which the School is administered by public officials. (Ol. Bd. 1.); 24 P.S. §§17-1703-A, 17-1716-A.

Unlike the cases where the Board has exercised jurisdiction over charter schools, Olney Charter’s actual administration and operations place it squarely within the political subdivision exemption in Section 2(2) of the Act. In the instant case, Olney Charter’s BOT is comprised entirely of public officials, and the BOT maintains strict control over both the finances and educational operations of Olney Charter. There is no for-profit corporation that would or could

be the employer of the Petition's proposed bargaining unit. Under current law and legal precedent, it is clear that the Board lacks jurisdiction over the Olney Charter.

B. The Regional Director's Decision In The PA Virtual Charter School Is Factually Distinguishable

In *The Pennsylvania Virtual Charter School*, the Regional Director concluded that the charter school was an “employer” within the meaning of the Act because it was created by private individuals, its operations were overseen by an autonomous BOT and any oversight by public officials occurred after-the-fact and solely for reporting purposes. The Pennsylvania Virtual Charter School, Case 04-RC-143831 at 1-2 (2015) (“PA Virtual”).⁹

1. Unlike The Decision In PA Virtual, Olney Charter Was Created By The District And Not Private Individuals

Contrary to the Hearing Officer's conclusion and as discussed more fully below, Olney Charter was **not** created by private individuals. Prior to the issuance of the charter agreement, Olney Charter was incorporated as a non-profit public corporation solely organized for educational purposes. (Ol. Bd. 1.) Olney Charter was “created” upon the issuance of the initial charter agreement on August 17, 2011 by the District. (Ol. Bd. 1.) The Hearing Officer's conclusion that the stark distinction between charter school and charter school applicant is “just semantics” is both erroneous and prejudicial. (Dec. 7). As explained in detail below, the distinction is both substantive and merited.

Like its public school counterparts, as a Renaissance Charter School, Olney Charter would not and could not exist separate and apart from the Dept. of Ed. Without the charter,

⁹ The decision in *PA Virtual* is currently on appeal at the request of employer because the case raises substantial issues warranting reviewing. PA Virtual, Case 04-RC-143831 (Washington, D.C., March 25, 2015). Likewise, the Employer's instant request for review should also be granted as the substantial issues warranting review are similar and more pronounced in this matter because of Olney Charter's status as a renaissance public school.

which is granted, regulated and operationally overseen by the District, Olney Charter would cease to exist and would revert back to a traditional public school. (Tr. 44:16-21.) For the above reasons, Olney Charter was created by the Commonwealth of Pennsylvania acting through the District.

2. As A Renaissance Charter School, Public Officials Have Substantial Oversight Over Olney Charter

As a public school funded with public dollars, Olney Charter must adhere to all mandates of NCLB, Pennsylvania State Common Core Standards, IDEA (Special Education) and Title III of the IEA (English Language Learner). (Ex. 3) These mandates require that Olney Charter annually report teacher certifications and qualifications, student test results on Pennsylvania state-mandated tests, special education compliance metrics, ELL compliance metrics, graduation and matriculation rates, attendance, meals served, and any serious incidents. (Ol. Bd. 1.)

In addition to the above reporting requirements, as a renaissance charter school, Olney Charter's operations are overseen by the SRC, the Superintendent and the District. (Ex. 3.) This added power is also reflected in the language of Olney Charter's charter agreement, which "incorporate[ed] power to the SRC over the this charter school [Olney Charter], that charter – public charter school law does not allow." (Tr. 44:23-25.) The District is required to evaluate all renaissance charter schools to monitor the school's progress towards the performance goals articulated in the charter agreement. (Ex. 2.) These performance goals are set by the District and intended to hold renaissance charter schools to a higher degree of accountability as compared to public and traditional charter schools. (Ex. 2; 7.) As a renaissance charter school, public officials exhibit a much higher degree of control and oversight over Olney Charter than the cyber-school at issue in *PA Virtual*.

The aforementioned distinctions are material and clearly distinguish the decision in *PA Virtual* from the instant matter.

C. The Regional Director's Decision In The Pennsylvania Cyber Charter School Is Distinguishable

1. The Department Of Education Can Legally Discipline, Suspend Or Terminate Charter School Employees

In *The Pennsylvania Cyber Charter School*, the Region concluded that the charter school employees were not subject to be hired, fired and/or disciplined by the Dept. of Ed. The Pennsylvania Cyber Charter School, Case 06-RC-120811, at 7-8 (2014) ("PA Cyber"). The Dept. of Ed. does in fact have the power to discipline and/or terminate charter school employees. See Pa. Stat. Ann. Tit. 24, §§2070.1a to 2070.18a.

The Professional Practices and Standards Commission (consisting of members appointed by the State Governor and approved by consent of a majority of the State Senate) under the Educator's Discipline Act is able to direct the Department to: (a) suspend an educator's certificate and employment eligibility for criminal offenses; (b) issue discipline against any educator for conduct not permitted under §2070.9c(a); (c) direct the Department to revoke a certificate and employment eligibility of an educator who is a named perpetrator of a founded report of child abuse or responsible for injury or abuse in a founded report for a school employee; and/or (d) immediately reinstate a certificate and employment eligibility upon receipt of a certified document indicating a founded report of child abuse founded report for a school employee was reversed or determined to be unfounded. 24 P.S. §§2070.9b, 2070.9c, 2070.9d. An educator is defined by the Educator's Discipline Act to include any person *"who holds a certificate, who is a charter or cyber charter school staff member or who is a contracted educational provider staff member."* See 24 P.S. §2070.1b.

In the instant matter, the proposed bargaining unit would consist of professionals, including all teachers, co-teachers, psychologists, counselors, deans, and in-house substitute teachers. (Dec. 1.) At Olney Charter, like other public schools, all of its teachers are certified. (Tr. 54:3-15.) This means that all of the teachers in the proposed bargaining unit hold a certificate. Therefore, as expressly stated in the Educator's Discipline Act, the Dept. of Ed. has express legal authority to both discipline, suspend and/or terminate (through revocation of employment eligibility) the employees or potential bargaining unit members at issue here.

2. Unlike The Decision In PA Cyber, Olney Charter Was Created By The District And Not Private Individuals

Despite the ministerial requirements that Pennsylvania's charter schools be incorporated as public nonprofit entities, they do not gain status as a public school and therefore do not meet the definition of a “charter school” **until** such time as a charter is issued by the District. Prior to the issuance and receipt of a signed charter agreement, only a charter school *applicant* exists and not a charter school itself. *See* 24 P.S. §17-1703-A (defining “charter school” as “an independent *public school* established and created under a charter from the local board of school directors...”). The Hearing Officer’s conclusion that this distinction is merely semantics is erroneous and directly contradicts the express definition contained in Pennsylvania law regarding what entities constitute charter schools. Furthermore, ASPIRA, Inc., of Pennsylvania responded to the District’s Request for Qualifications and Request for Proposals several months before incorporating the non-profit entity. (Tr. 32:22-25—33:1-10; 94:1-15.) As a result, private individuals did not “create” Olney Charter; rather, Olney Charter was “created” upon the issuance of the initial charter agreement on August 17, 2011.

Like its public school counterparts, Olney Charter would not exist separate and apart from the Dept. of Ed. Without the charter, which is granted, regulated and operationally overseen by the District, Olney Charter would cease to exist and would revert back to a traditional public school. (Tr. 44:16-21.) In short, Olney Charter is a creation of and exists within the Commonwealth's public school system.

3. Unlike The Cyber Charter School At Issue In PA Cyber, As A Renaissance Charter School, The Commonwealth Of Pennsylvania Provides More Than Just Periodic Renewal Of Olney Charter

The Commonwealth of Pennsylvania not only functioned as the authorizer of Olney Charter at the time its charter was issued in 2010, the Dept. of Ed. also continually oversees the administration of Olney Charter. The District performs several supervisory and administrative functions over Olney Charter, including: (i) the thorough review and approval of all of Olney Charter's operations; (ii) mandating that Olney Charter file an annual report with the Dept. of Ed.; (iii) requiring Olney Charter to comply with strict student admission procedures; (iv) requiring Olney Charter to account for and record student enrollment and attendance; (v) mandating that Olney Charter adopt and comply with the District's Code of Student Conduct; (vi) reserving the right to assign public school students to Olney Charter's autism and life skills program (vii) requiring that the District have ongoing access to Olney Charter's facilities; and (vii) the ability to revoke or not renew Olney Charter's authorization.

4. Contrary To The Decision Regarding PA Cyber Public Officials Are Involved In The Appointment And Removal Of Members Of The Board Of Trustees For Charter Schools In The Commonwealth Of Pennsylvania

The Charter School Law unambiguously states that “trustees of a charter school shall be public officials.” 24 P.S. § 17-1715-A(11).¹⁰ As a result of this express statutory classification, all new members of Olney Charter’s BOT are removed and/or elected by existing trustees in their capacity as public officials and not as private citizens. (Tr.84:18-25; 85:1-8.) The inaugural members of Olney Charter’s BOT were submitted to the District as part of the charter application process and their membership on the BOT was ratified by the District’s grant of a charter to Olney Charter. (Ol. Bd. 1.)

Contrary to the decision in *PA Cyber*, the oversight and reporting requirements for a renaissance charter school are far more demanding than those requirements for a cyber or traditional charter school. The Hearing Officer’s decision fails to take into account the material differences between the school in *PA Cyber* and Olney Charter; therefore, the strict application of *PA Cyber* to the instant matter was erroneous and prejudicial. Moreover, as a renaissance charter school, the District’s strict oversight of Olney Charter is much more exacting than the oversight of a charter school under the law in Illinois in *CMSA*.

The aforementioned distinctions are material and clearly distinguish the decision in *PA Cyber* from the instant matter.

D. The PLRB’s Proposed Decisions In Agora And New Media Are Distinguishable And Do Not Govern The Instant Matter

¹⁰ The members of the BOT, as public officials, are subject to Pennsylvania's Public Official and Employee Ethics Act ("Ethics Act"). Public official is defined as, "[a]ny person elected by the public or elected or appointed by a governmental body or an appointed official in the executive, legislative or judicial branch of this Commonwealth or any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision thereof" 65 Pa. Cons. Stat. Ann. § 1102.

In two recent decisions, *The Matter of the Employees of Agora Cyber Charter School*, Case No. PERA-C-12-146-E (June 13, 2013) (“Agora”) and *In the Matter of the Employees of New Media Technology Charter School Alliance of Charter School Employees Local 6056 AFT*, Case No. PERA-R-11-130-E (June 17, 2013) (“New Media”), the Pennsylvania Labor Relations Board (PLRB”) relying on the decision in *CMSA*, held that a charter school was a private employer subject to the Board’s jurisdiction. However, in the instant matter, Olney Charter is distinguishable from those decisions for the same reasons it is distinguishable from *CMSA*; explained at length supra.

In *Agora*, the PLRB found that (1) the charter school was operated by K12, Inc., a for-profit education company publicly traded on the New York Stock Exchange; (2) the members of the charter school’s BOT were neither publicly elected nor appointed and/or removed by public officials; and (3) the Board had previously taken jurisdiction over a charter school in Pennsylvania with a privately appointed board. Agora, PERA-C-12-146-E at 1. Relying heavily on the rationale in *CMSA* the PLRB reasoned that “where the appointment and removal of a majority of an entity’s governing board members is controlled by private individuals—as opposed to public officials—the entity will be subject to the Board’s jurisdiction.” Id.; *see also CMSA*, 359 NLRB at *8. As a result, PLRB concluded that *Agora* was a private employer subject to the jurisdiction of the NLRB.

The PLRB’s heavy reliance on the method for appointment and removal of the BOT in the *Agora* decision was improper because an entity is a political subdivision if it satisfies **either** prong of the *Hawkins County* test. Additionally, the finding in *Agora* is distinguishable from the operations and procedures of Olney Charter in the present matter. Unlike the charter school in *Agora* which is run by a publically traded for-profit company, Olney Charter’s operations are

controlled by its *non-profit* public Board members, who are all public officials under the Charter School Law. *See* 24 P.S. §17-1715-A(11); (Px. 1, 2.) The charter school in *Agora* apparently failed to meet the second prong of the *CMSA* test because it was controlled by a for-profit entity and its board members were not appointed or approved by public officials. The charter school in *Agora* was operated under far different and distinguishable circumstances from Olney Charter.

The decision in *Agora* also referenced and relied upon the proposed decision in the *New Media* matter.¹¹ The PLRB summarily concluded that the charter school in *Agora* had a "privately appointed board of directors" and was therefore subject to NLRB jurisdiction. However, Olney Charter is different from the charter school in *New Media* because unlike traditional charter schools, Olney Charter is a renaissance charter school created directly by the District to function as a public neighborhood school. (Tr. 25:1-14; Ex. 2-3, 7.)

Moreover, in *New Media* the PLRB made a factual finding that "[t]he members of the Board of Directors of New Media are not publicly elected. They are not appointed or removed by public officials." *New Media*, PERA-R-11-130-E at 2. This factual finding was based upon PLRB's conclusion that "[t]he members of New Media's Board of Directors are neither elected by the public *nor directly accountable to a public official*." *Id.* at 3 (emphasis added). Consequently, the PLRB held that the charter school was a private employer subject to the Board's jurisdiction. *Id.*

Unlike the seemingly traditional charter school at issue in *New Media*, Olney Charter is a Renaissance Charter School subject to the direct oversight of public officials and/or individuals beholden to the general electorate. Specifically, the Commonwealth sets the accountability standards for Olney Charter and is responsible for ensuring that Olney Charter meets those

¹¹ It is important to note that *New Media* also erroneously relied on *CMSA*'s analysis of the second-prong of the *Hawkins County* test.

expectations, these additional accountability standards are inapplicable to traditional charter schools:

The [renaissance] charter schools are still governed under Pennsylvania Charter School law, but in addition, there were accountability targets over and above...there were accountability targets over and above what's normally required in the charter school law in Pennsylvania. And the accountability targets included a number of metrics, which we can go into some detail on, just talking about the policy now, but these metrics require that the turnaround team actually in the charter agreement, sign up for and agree to targets on an annual basis that had to be hit in order to maintain management over the school for the school district. And if they did not hit those targets, then the school -- the SRC had the right, again, totally outside of charter school law, to actually take the school back because the goal is to get the school turned around. And if it wasn't performing, the SRC had the right every year in the contract to evaluate it.

(Tr. 30:4-20.) As explained at length above, as a renaissance charter school, Olney Charter must comply with the strict mandates of the District's Renaissance Initiative Policy and the stringent performance metrics within its charter agreement. The stated purpose of the Renaissance Initiative—the transformation of chronically low performing public schools—necessitates a more direct relationship between Olney Charter and the Commonwealth of Pennsylvania. Furthermore, renaissance charter schools are subject to more specific regulations that are different from those applicable to traditional charter schools generally. Therefore, the BOT in the *New Media* matter was not have been directly accountable to public officials or the general electorate in the same capacity as Olney Charter.

As discussed *supra*, Olney Charter—unlike traditional charter schools—is **directly** accountable to public officials and the general electorate. Olney Charter is specifically accountable to both the Superintendent and the District, which directly issued Olney Charter's current charter agreement and maintains the right to revoke the charter at **any time** and/or not renew the charter. (Ex. 3); *see also* 24 P.S. § 17-1729-A. Furthermore, as a public school, Olney

Charter is also accountable to the Dept. of Ed. Olney Charter is therefore operated under a different and distinguishable set of circumstances from the charter school in *New Media*.

As it did in the *Agora* case, the PLRB again relied on the Board's reasoning and the test outlined in the *CMSA* matter when making its findings in *New Media*. Similar to the charter school in *CMSA*, members of Olney Charter's BOT elects its own members. (Tr. 84:18-25—85:1-8.) However, the critical distinction from the charter school in *CMSA* is that in Pennsylvania **new members are elected by other trustees in their capacity as public officials.** See 24 P.S. §17-1715-A(11).

For all of the aforementioned reasons, Olney Charter is a public employer because it is a political subdivision of the Commonwealth of Pennsylvania and is administered by and accountable to public officials. As outlined in the Articles of Incorporation and previously discussed herein, Olney Charter was established under Pennsylvania law as a sole purpose *public non-profit* accountable to the taxpayers in the Commonwealth of Pennsylvania. Olney Charter's operations are controlled by the public officials on its BOT, and all appointments or removals are done by the current board members, who are themselves, by definition of the Charter School Law, public officials.

Unlike the charter schools in *Agora* or *New Media*, Olney Charter—as a renaissance charter school—is a political subdivision of the Commonwealth and cannot be held to be anything other than a public employer because it falls squarely into the standards articulated in the *Hawkins County* test. While the charter schools in *Agora* and *New Media* fail to meet either prong of the *Hawkins County* test outlined in *CMSA*, Olney Charter has presented an abundance of evidence that it satisfies both prongs of the *Hawkins County* test. As a result, Olney Charter—unlike the charter school in *CMSA* that was established under distinguishable law in Illinois—is

not subject to the jurisdiction of the Board. Any ruling that a Pennsylvania renaissance charter school, such as Olney Charter, is not a political subdivision and/or not administered by individuals accountable to public officials and is subject to the jurisdiction of the Board would have potentially dire consequences and be in direct conflict with *Hawkins County* and its progeny.

E. Statutory Provisions Contained Within the Pennsylvania Charter School Law Makes Clear That The Legislature Intended For Charter Schools To Fall Under The Jurisdiction Of The Pennsylvania Labor Relations Board

It is apparent that the Pennsylvania General Assembly intended for union activity at charter schools to fall within the scope of the state law and therefore within the jurisdiction of the PLRB. In addition to the mandate that charter school employees participate in the state-sponsored retirement plan, the Charter School Law also expressly states that “[e]mployees of a charter school may organize under the [Public Employees Relations Act].” 24 P.S. §17-1724-A. By including both the benefits eligibility provision and the authorization to organize provision, it is evident that the legislators intended for charter schools to be public employers under jurisdiction of the Pennsylvania Public Employee Relations Act in the same manner as any public school district in the Commonwealth.

It would be improper for the Board to exercise jurisdiction over Olney Charter because it would infringe upon an area traditionally occupied by state law. There are several state statutory provisions in state law that directly addresses union activity of public school employees. For example, under Pennsylvania law, unions are limited to two strikes during a given school year. *See* 24 P.S. §11-1101-A. Moreover, advisory arbitration is mandatory when a strike will prevent the school entity from providing 180 days of instruction within the delineated school year. *See* 24 P.S. §11-1125-A(b).

Pennsylvania's Secretary of Education may also seek an injunction when the union has been on strike long enough that the school entity will not be able to provide 180 days of instruction by June 30. *See* 24 P.S. § 11-1161-A. Federal law does not contain the same limitations. The limitation on the number or length of strikes and such other methods incorporated into Pennsylvania's Public School Code to promote student success are likewise lacking from federal law.

Notwithstanding the limitations outlined about applicable to public schools in general, the legislative intent regarding Olney Charter's public nature is even more apparent because Olney Charter is a district under the direction of the SRC. As noted in paragraph 15 of the Stipulation, the Public School Code of 1949 (the "Code") clearly states that teachers are prohibited from engaging in strikes when they work in school districts under the direction of the SRC.

During the time the school district of the first class is under the direction of the School Reform Commission, all school employes shall be prohibited from engaging in any strike as defined in Article XI-A and section 301 of the act of July Act." The Secretary of Education may suspend the certificate of an employe who violates this subsection.

24 P.S. § 6-696(1). Under the Public Employers Relations Act, a strike is defined as follows:

"Strike" means concerted action in failing to report for duty, the willful absence from one's position, the stoppage of work, slowdown, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges, or obligations of employment.

Act of July 23, 1970, P.L. 563, No. 195, as amended; 43 P.S., Sections 1101.101 to 1101.2301 inclusive.

Olney Charter was created at the express directive of the SRC and the SRC maintains control over the school. Paragraph 15 of the Stipulation highlights the stark contradictions

between the NLRA and the Commonwealth's law. It would be improper for the Board to exercise jurisdiction over Olney Charter because it would infringe upon Pennsylvania's rights and an area traditionally occupied by Pennsylvania law. There are several other Pennsylvania statutory provisions that directly address union activity of public school employees, and in particular those public school employees at SRC run schools. As noted above, Pennsylvania law contains a prohibition against striking which directly applies to teachers at Olney Charter.¹² Federal law does not contain the same limitations. The prohibition on strikes and such other methods incorporated into the Code to promote student success are likewise lacking from federal law. Subjecting charter schools under the SRC's control to the Board's jurisdiction would infringe upon the Commonwealth's right to control and rehabilitate distressed first class public schools and render meaningless substantive Pennsylvania legislation. The Pennsylvania legislature clearly intended for SRC controlled schools to be subject to the Commonwealth's labor relations laws, not those of the NLRA. Notably, the Hearing Officer failed to address this critical and determinative state restriction on rights granted under the NLRA.

Subjecting Pennsylvania's charter schools to the Board's jurisdiction would grant the federal government power to control a substantive portion of Pennsylvania's educational system and remove it from the Secretary of Education's control. Application of the Board's jurisdiction would result in a scheme never contemplated by the Pennsylvania legislature.

F. The Sound Reasoning Of The Regional Director's Decision In Los Angeles Leadership Academy Is Persuasive

The Hearing Officer's Decision entirely ignores the reasoning in *Los Angeles Leadership Academy*, Case 31-RM-1281 (2006) ("Leadership Academy"). The Hearing Officer's failure to consider this factually similar case was erroneous and prejudicial. Like the decision in *CMSA* the

¹² As a public renaissance charter school, 24 P.S. § 6-696(1) also applies to Stetson Charter.

Leadership Academy case also applied the two prong *Hawkins County* test. The only material difference between *Leadership Academy* and the instant matter is that the union, rather than the employer sought the political subdivision exemption.

In *Leadership Academy*, the Regional Director ruled in favor of the Union and Intervenor, concluding that the academy was a political subdivision of the State of California and therefore exempt from the Board's jurisdiction. Leadership Academy, 31-RM-1281 at 7. In *Leadership Academy*, the Regional Director applied the two-prong *Hawkins County* test and concluded that the Academy satisfied both prongs.

In assessing the first prong of the *Hawkins County* test, the Regional Director concluded that the academy was created by the State of California because of the language of the enabling statute, the statutory scheme governing the academy's operation and the state funding the academy received.

The enabling legislation for California charter schools and Pennsylvania charters schools are substantially similar in several ways, most notably, charter schools under both California and Pennsylvania law are: (1) created to improve the public school systems; (2) unequivocally intended by the respective legislatures to be part of the public school systems; and (3) required to receive state approval of the schools' charter. See Leadership Academy, 31-RM-1281 at 2-3; 24 P.S. §§17-1702-A, 17-1703-A. Additionally, like the academy, Olney Charter receives the majority of its funding from state or federal funds expressly allocated for public schools and the furtherance of the public school system. (Tr. 113:4-15.) Like the academy in the *Leadership Academy* case, Olney Charter is a statutorily created public charter school. Based on the legally and factually significant similarities between Olney Charter and the academy in the *Leadership*

Academy case, it is evident that Olney Charter also meets the first prong of the *Hawkins County* test.

As to the second analytical prong of the *Hawkins County* test, the Regional Director concluded that the academy was administered by individuals responsible to public officials because of the express language of California's Charter School Act, the language of the academy's charter agreement and the academy's reporting requirements. Leadership Academy, 31-RM-1281 at 5.

The language in California's enabling statute is almost *identical* in spirit and purpose to the language in Pennsylvania's Charter School Law. Similar to California's Charter School Act, the Pennsylvania legislature has unambiguously stated that charter schools are "independent public schools" created for the purpose of "provid[ing] parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system." 24 P.S. §§17-1702-A, 17-1703-A. It is clear from the express statutory language that the Pennsylvania legislature intended for charter schools to operate under and within the framework of the Commonwealth's public school system.

In concluding that the academy satisfied the second prong of the *Hawkins County* test, the Regional Director analyzed the language of the academy's charter agreement and concluded that it requires state oversight over the academy's budget. Leadership Academy, 31-RM-1281 at 6. Olney Charter's charter agreement contains similar reporting requirements. Like the school in *Leadership Academy*, Olney Charter was required to submit its budget and financial records to the Commonwealth in order to obtain its charter authorization. Moreover, this is not merely a one-time ministerial requirement; rather, Olney Charter must submit its financial records, including an annual independent audit, to Pennsylvania's Secretary of Education on an annual

basis like the school in *Leadership Academy*. As explained at length above, as a renaissance charter school Olney Charter must also adhere to more stringent reporting requirements and the Commonwealth has a significant amount of oversight over Olney Charter's operations, including the enrollment of special needs students from throughout the District in Olney Charter's autism and life skills program. In *Leadership Academy*, the Regional Director noted the similarities between the many regulations and reporting requirements applicable to both the academy and all public schools. Likewise, Pennsylvania law treats charter schools and public schools the same with regards to reporting compliance and requirements, which includes curriculum standards, the performance of criminal background checks on employees and the certification requirements of charter school teachers. (Ex. 3); *see also* 24 P.S. §§ 17-1720-A *et seq.*

Lastly, there are several other factors that further evidence the similarities between *Leadership Academy* and the instant matter, including the: (1) significant parental involvement in Olney Charter through the mandates of the Renaissance Initiative; (2) adherence to the District's Student Code of Conduct which includes due process rights and oversight by the District of disciplinary actions against Olney Charter students; (3) mandatory reporting to the District of all student expulsions; (4) monitoring of all student's academic progress through testing and reporting requirements that apply to public schools; (5) strict accountability requirements imposed on Olney Charter by both the Charter School Law and the Renaissance Initiative Policy, including the applicability of NCLB which also applies to public schools in the Commonwealth.

For the aforementioned reasons, Olney Charter, like the school in *Leadership Academy*, satisfies the second prong of the *Hawkins County* test.

G. Denial Of Jurisdiction Would Have Only A Minimal Impact On Pennsylvania's Traditional Charter Schools, Government Contractors and Their Respective Employees

While it is evident that Olney Charter is exempt from the NLRB's jurisdiction, assuming *arguendo* that the Board disagrees, the Board should nonetheless exercise its discretion and decline jurisdiction. As discussed in detail above, Olney Charter, as a renaissance charter school, is unique and different from traditional charter schools or government licensees/contractors because of the complexity and requirements of the District's Renaissance Initiative Policy. Because of Olney Charter's status as a public renaissance charter school, Olney Charter would be wholly unable to conduct business outside of operating a public school within the defined geographic boundaries of its neighborhood area. Moreover, Olney Charter was formed after Olney High School was identified as a low performing charter school in need of massive reform and the charter was issued solely for the purpose of providing public education to Philadelphia students.

The scope of services that Olney Charter is authorized to provide is expressly limited and focused solely on educational services because Olney Charter may only provide public educational services to Philadelphia students within a defined catchment area, notwithstanding the District's administration over enrolment of non-neighborhood children in Olney Charter's autism and life skills program. When Olney Charter was created there were only a short list of public schools that were identified as "potential Renaissance schools." (Tr. 34:18-20.) In light of the limited number of renaissance charter schools in Philadelphia, should the NLRB decline jurisdiction there would be very little, if any, impact on other governmental entities, contractors or employees. Moreover, declining jurisdiction would comport with Board precedent.

The NLRB has previously declined jurisdiction where the employer's business was deemed to have an insubstantial impact upon commerce or was local in character, and where the exercise of jurisdiction would have no effect on the policies underlying the NLRA. *See e.g.*,

Guss v. Utah Labor Relations Board, 353 U.S. 1, 3 (1957); Clayton-Dorris Co., 78 NLRB 859 (1948); Duke Power Co., 77 NLRB 652 (1948); F.G. Congdon, 74 NLRB 1081 (1947); Johns-Manville Corp., 61 NLRB 1 (1945); Brown & Root, Inc., 51 NLRB 820 (1943).

Moreover, the Board's discretionary power to deny jurisdiction has been codified in 29 U.S.C. §164(c)(1):

The Board, in its **discretion**, may by rule of decision...**decline to assert jurisdiction** over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.

In situations where the Board declines to assert jurisdiction, the States are free to regulate labor relations without being subject to federal preemption. Id. As discussed at length above, Pennsylvania already has a statutory scheme designed to regulate the labor relations of charter school employees. The NLRB is an administrative agency and its jurisdictional reach is expressly limited by statute and the Board cannot exercise jurisdiction that exceeds the bounds of the NLRA. Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 918 (3d Cir. 1981).

The Board's denial of jurisdiction would effectuate the intent of the Pennsylvania legislature as the Commonwealth would be responsible for regulating the labor relations of the proposed collective bargaining unit in the instant matter. By denying jurisdiction, Pennsylvania would retain control over its own public educational system. The NLRB has previously declined to assert jurisdiction over schools because of the public purpose served by schools and because state education agencies exercised control over their own schools systems. By way of example, the Board has declined to exercise jurisdiction over *private* non-profit schools contracted by state and local governments to provide various special education services. Overbrook Sch. For the Blind, 213 NLRB 511 (1974); *see also* Laurel Haven Sch. For Exceptional Children, Inc., 230 NLRB 1197 (1977) (declining to exercise jurisdiction because the school operated as adjuncts of

the state's public school systems). In the instant matter, Olney Charter is a public school operating as part of the Commonwealth's public school education system pursuant to the Charter School Law and the Renaissance Initiative—Olney Charter is part of the Commonwealth's statewide public education system. (Ex. 2-3); *see also* 24 P.S. §17-1701-A *et seq.*

The Board possesses broad discretion to decline jurisdiction under the NLRA and should do so in this case because of Olney Charter's unique status as a renaissance initiative public school.

VI. CONCLUSION

For the foregoing reasons and based on the record evidence, Olney Charter respectfully requests that the Board reject those portions of the Hearing Officer's Decision excepted by Employer. As explained above, it must be found that Olney Charter is a political subdivision exempt from the Board's jurisdiction and the dismiss the election results and the Union's representation petition must be dismissed in their entirety.

Respectfully submitted,

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